(4)

No. 05-1083

IN THE

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* LIFE LEGAL DEFENSE FOUNDATION IN SUPPORT OF PETITIONERS

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AS HELD BY THIS COURT, AN ANNOUNCED RULE OF FEDERAL LAW MUST BE APPLIED RETROACTIVELY BY ALL COURTS IN ALL CASES STILL OPEN ON DIRECT REVIEW. THIS CASE WAS STILL OPEN ON DIRECT REVIEW WHEN THIS COURT DECIDED *VIRGINIA V. BLACK* AND *SCHEIDLER V. NATIONAL ORGANIZATION FOR WOMEN*. YET THE NINTH CIRCUIT REFUSED TO APPLY THOSE PRECEDENTS, PREJUDICING NOT ONLY THE PETITIONERS, BUT THIS *AMICUS* AND ITS ACTIVIST CLIENTS, WHO CANNOT KNOW WHAT THEY LAWFULLY MAY AND MAY NOT DO. THEREFORE THE AUTHORITATIVE INTERVENTION OF THIS COURT IS ESSENTIAL.

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INTEREST OF AMICUS CURIAE*

Life Legal Defense Foundation ("LLDF") is a California non-profit corporation which provides legal assistance to pro-life advocates. As stated in its mission statement, the purpose of the Foundation is

> [t]o give innocent and helpless human beings of any age, particularly unborn children, a trained and committed defense against the threat of death, and to support their advocates in the nation's courtrooms. LLDF will accomplish its mission and purpose through the law and education.

LLDF is deeply concerned about the decision of the Ninth Circuit *en banc* panel in this case given its impact not only on the speech of the petitioners, but on the speech of countless others. LLDF represents many pro-life individuals who, in the face of the gargantuan judgment imposed on the defendants, are being chilled in their anti-abortion advocacy by the Court of Appeals' circumscribing of First Amendment rights. The chill is only intensified by the Court of Appeals' refusal to adhere to and apply intervening precedents of this Court, for with this Court saying one thing and the Ninth Circuit saying quite another, LLDF and its attorneys have no firm ground on which to stand in advising their clients what they may and may not lawfully do.

Freedom of expression requires breathing space. *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963). There is no breathing space here—not when the line between protected free speech and actionable threats is so indistinct that the Court of Appeals in the current case split on the issue down the middle, six judges against five, and when the cost to potential defendants in

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* Counsel for all parties have consented to the filing of this *amicus* brief. Their consent letters are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. No person or entity other than the Life Legal Defense Foundation or its members or counsel made a monetary contribution to the preparation or submission of this brief.

future similar cases of guessing wrong which side will prevail runs into the tens of millions of dollars. Those future potential defendants are the current clients of this *amicus* who need its advice. *Amicus* Life Legal Defense Foundation, its clients and all other persons deeply committed to pro-life advocacy and activism thus need the authoritative intervention of this Court.

SUMMARY OF ARGUMENT

This Court has left no doubt concerning the obligation of all courts—including, needless to say, the inferior federal courts—to give this Court's controlling interpretation of federal law full retroactive effect in all cases still open on direct review and as to all events irrespective of whether they predate or postdate announcement of the rule. That was the obligation of the United States Court of Appeals for the Ninth Circuit in this case after this Court entered its decisions in *Virginia v. Black*, 538 U.S. 343 (2003), and *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, for those decisions announced legal standards for, respectively, alleged threats and extortion which are at the crux of the FACE Act and RICO Act allegations here. For a threat to be a "true threat" there must be a statement by means of which the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals, and for there to be "extortion" property must actually be obtained or acquired. The Ninth Circuit should have applied those rules of federal law to this still-pending case, but it refused to do so.

This refusal of the Court of Appeals has done more than simply impose on the petitioners in particular an enormous financial liability and a choke collar on their First Amendment freedom of speech. It has done more even than tie the choke collar on the many other pro-life advocates who feel

called to engage in similar kinds of activism, but now are fearful of doing so. It has also made it impossible for public interest law firms like this *amicus* and its attorneys to advise their activist clients what the law is. This Court has said one thing, and that should be binding, yet the Ninth Circuit has said something quite different. And the clients of this *amicus* do, after all, live in a Ninth Circuit jurisdiction and so must look over their shoulders at what the law in that jurisdiction is said to be. The situation thus is intolerable for all involved: the petitioners themselves, the countless others who share their commitment to the pro-life cause, and their legal counsel. The situation can be rectified only through the granting of *certiorari* and then the reversal of the judgment by this Court.

ARGUMENT

As held by this court, an announced rule of federal law must be applied retroactively by all courts in all cases still open on direct review. This case was still open on direct review when this court decided *Virginia v. Black* and *Scheidler v. National Organization for Women*. Yet the Ninth Circuit refused to apply those precedents, prejudicing not only the petitioners, but this *amicus* and its activist clients, who cannot know what they lawfully may and may not do. Therefore the authoritative intervention of this Court is essential.

This Court has made plain the absolute jurisprudential obligation of the inferior courts to apply federal law as determined by this Court to parties in cases that remain pending. In *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), retired federal employees sought refunds for state income taxes, contending that *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), holding that a state constitutionally may not accord preferential tax treatment to

state retirement benefits while taxing federal benefits, applied retroactively, but the Virginia courts refused. In reversing, this Court through Justice Thomas declared, "[A] rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law." *Id.* at 96.

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. . . . Mindful of the "basic norms of constitutional adjudication" that animated our view of retroactivity in the criminal context, [citation omitted] we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit "the substantive law [to] shift and spring" according to "the particular equities of [individual parties'] claims" of actual reliance on an old rule and of harm from a retroactive application of the new rule.

Id. at 97 (citation omitted). This Court, and therefore the lower courts as well, "ha[ve] no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently." *Id.*

Disregarding current law and treating similarly-situated litigants differently is precisely what the Ninth Circuit has done here. What the plaintiffs alleged the petitioners to have done in violation of law—the law in question being the Freedom of Access to Clinic Entrances ("FACE") Act, 18 U.S.C.A. § 248, and the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C.A. § 1961 *et seq.*—is abundantly clear; what this Court has declared regarding the conceptual underpinnings of those statutes is also abundantly clear. And the two are entirely different. In consequence, as a matter of law the plaintiffs' allegations

simply cannot stand, for the law as definitively enunciated by this Court is flatly contradictory of what the plaintiffs assumed and undoubtedly fervently hoped the law meant. Given that this case was still open on direct review at the time this Court announced its decisions, *Harper v. Virginia Department of Taxation*, *supra*, 509 U.S. at 97, the Ninth Circuit should have modified its judgment here—modified it, indeed, by vacating it entirely—in obedience to this Court's authoritative declaration. Motion to that effect was in fact made. The Ninth Circuit nevertheless outright refused.

The FACE Act speaks to "intentional[ ] intimid[ation]" by "force or threat of force" of one who provides abortion services, 18 U.S.C.A. § 248(a), and what the plaintiffs assumed and hoped the provision meant is plain both from their complaint and from the instructions they persuaded the trial judge to give the jury. The allegations were remarkably vague and nonspecific. According to paragraph 5 of the amended complaint, the defendants' words were "calculated" to "terrify plaintiffs. . . ." It was the "context of violence"—earlier violence committed by persons wholly unrelated to the petitioners—that "makes defendants' statements frightening to plaintiffs." *Id.* It was "when understood in this context" that "the intended message of the defendants' posters" was, assertedly, unmistakable: "If you do not stop providing access to reproductive health care, you will be injured or murdered like [others previously]." *Id.* The defendants "condone and promote" the use of violence by their followers, Amended Complaint at paragraph 6, and "as a proximate result" the plaintiffs "live in constant fear" that violent acts will be committed against them. *Id.* Therefore, the defendants' posters contained "threats" against the plaintiffs that have "intimidated" them. Amended Complaint at paragraph 78.

The jury instructions were entirely consistent with this, the plaintiffs' theory of what may constitutionally be deemed a threat. According to the trial judge, the "[d]efendants' sub-

jective intent or motive is not the standard that you must apply in this case. . . ." Petition Appendix at 416. The jurors need not

> find that any of the defendants actually intended to threaten plaintiffs, so long as you find that a reasonable person would have foreseen that [the statements] would be understood to be threatening.

Id. at 417–18. "[E]ven if [they] believe[d] that the defendants did not intend the statements to be threatening," the jurors were told, they must still find the statements to be threats if a reasonable person would have "foreseen" that the posters would be "interpreted" as threats. *Id.* at 416.

Whatever excuse the Ninth Circuit might have had for accepting this true-threat theory and these jury instructions before this Court's decision in *Virginia v. Black*, it had none after. Under *Black*,

> [i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the *intent* of placing the victim in fear of bodily harm or death.

538 U.S. at 360 (emphasis added). Nevertheless, a threat, to be a "true threat," must be a "statement[ ] where the speaker *means* to communicate a serious expression of an *intent* to commit an act of unlawful violence to a particular individual or group of individuals." *Id.* at 359 (emphasis added). Thus, there must be (1) a statement (2) through which the speaker *means* (3) to communicate his or her *intent* (4) to commit violence. To be sure, the intent in question is not that of actually carrying out the threat, *id.* at 360, but it most certainly is far more focused than whether a reasonable person would have "foreseen" that the statement would be "understood" or "interpreted" to be threatening. Rather, as the Second Circuit has characterized it, the threat must be "so unambiguous and have such immediacy that [it] convincingly express[es] an intention of being carried out."

United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976), *cert.* den. 429 U.S. 1022 (1976). It must be "[an] unequivocal, unconditional and specific expression[ ] of intention immediately to inflict injury. . . ." *Id.* The District Judge here notwithstanding, therefore, the defendants' subjective intent *was* the standard that the jurors were obligated to apply in this case, and the petitioners were *not* to be found liable unless the jurors found that the defendants intended the statements to be threatening.

The Ninth Circuit itself has since recognized that this is precisely what this Court held. In *United States. v. Cassel*, 408 F.3d 622 (9th Cir. 2005), the Court of Appeals, after noting "the vagaries of our own case law," the present case included, *id.* at 630, quoted the *Virginia v. Black* true-threat definition and said:

> The clear import of this definition is that only *intentional* threats are criminally punishable consistently with the First Amendment. First, the definition requires that "the speaker means to communicate . . . an intent to commit an act of unlawful violence." A natural reading of this language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim.

Id. at 631. This Court's "insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat" was especially clear, the Ninth Circuit in *Cassel* observed, "from its ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated by the statute's provision rendering *any* burning of a cross on the property of another 'prima facie evidence of an intent to intimidate.'" *Id.* The defendant's intent must actually be proved, for otherwise the First Amendment is offended. *Id.*

> Its holding thus affirms our own dictum—not always adhered to in our cases—that "the element of intent

> [is] the determinative factor separating protected expression from unprotected criminal behavior."

Id. at 632, quoting *United States v. Gilbert*, 813 F.2d 1523, 1529 (9th Cir. 1987).

"[N]ot always adhered to in our cases. . . ." Indeed. In *PPCW VIII*, *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, 422 F.3d 949 (9th Cir. 2005), which remitted punitive damages to nine times compensatory, the petitioners raised seven other issues on remand to the District Court and then on appeal, including the applicability of this Court's intervening decisions in *Virginia v. Black* and *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), but the Ninth Circuit peremptorily rebuffed them. 422 F.3d at 966. "[W]e agree with the district court that it could not go there, nor can we, because all these issues were finally settled in *PPCW V* [*Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc)]." *PPCW VIII*, 422 F.3d at 966. After *PPCW V* the Court of Appeals had stayed its mandate to give the defendants the opportunity to petition this Court for *certiorari*, but once *certiorari* was denied the mandate issued, *PPCW VIII*, 422 F.3d at 966, and that being so, the Court of Appeals said, once the Supreme Court had decided the case and remanded it whatever was before the Supreme Court and disposed by it was deemed finally settled as the law of the case. *Id.*, quoting *In re Sanford Fork & Tool Company*, 160 U.S. 247 (1895). The difficulty is, of course, that this Court in denying *certiorari* did *not* decide and dispose of the case, for a denial of *certiorari* is not an adjudication on the merits.* *Missouri v. Jenkins*, 377 U.S. 70, 83–86 (1995).

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* That a denial of *certiorari* is not an adjudication on the merits is, needless to say, the principle applicable in all cases, but its applicability is only reinforced here. The Ninth Circuit in *PPCW VIII* in part based its refusal to consider the issues raised by the defendants on the ground that, when the defendants had petitioned this Court for *certiorari*, the Solicitor General ar-